IDA SHAFINAZ MOHAMED KAMIL & ORS
v. UNIVERSITI MALAYSIA SABAH

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RAVINTHRAN PARAMAGURU J
[SUIT NO: BKI-12B-5-7-2017]
6 SEPTEMBER 2018

CONTRACT: *Agreement – Scholarship agreement – Employee entered into scholarship agreement with employer to pursue studies – Allegation that employee breached scholarship agreement by failing to complete studies within stipulated and extended periods – Employer issued notice of demand seven years after employee invited to re-join employment – Whether employee required to successfully complete doctoral degree course – Whether scholarship agreement frustrated – Whether there was acquiescence – Whether limitation had set in*

LIMITATION: *Commencement of action – When action commenced – Employee entered into scholarship agreement with employer to pursue studies – Allegation that employee breached scholarship agreement by failing to complete studies within stipulated and extended periods – Employer issued notice of demand seven years after employee invited to re-join employment – Whether scholarship agreement frustrated – Whether there was acquiescence – Whether limitation had set in – Whether there was fresh limitation period – Sabah Limitation Ordinance (Cap. 72), s. 19(1)*

The first appellant, a lecturer of the respondent, was granted paid study leave to pursue her doctoral degree at the United Kingdom. The first appellant and the respondent then entered into a scholarship agreement, which was guaranteed by the second and third appellants. According to the respondent, the first appellant had breached the scholarship agreement by failing to complete her doctoral degree within the stipulated period of three years or the extended period of three years and six months. The respondent commenced an action at the Sessions Court, claiming for RM342,945.93, being study leave allowances, expenses and costs incurred which were paid to the first appellant. The first appellant did not dispute that she failed to obtain the doctoral degree and, during trial, explained that (i) her degree supervisor was frequently on sick leave and went on sabbatical leave when she was in her final year; (ii) the replacement supervisor ('the second supervisor') was reluctant to comment on her thesis; and (iii) she re-joined the service of the respondent after her study leave had ended. In her defence, the first appellant submitted that (i) she was not obliged to successfully complete the course and her failure to obtain the doctoral degree was not a valid ground for termination of the scholarship agreement; (ii) the scholarship agreement was frustrated as it was terminated without a valid ground; and (iii) the respondent's claim was barred by limitation law and doctrines of acquiescence and laches. The Sessions Court Judge ('SCJ') rejected the first appellant's defence and entered judgment in favour of the respondent. Hence, the present appeal. In support of the appeal, the

appellants submitted that the SCJ (i) erred in holding that the scholarship agreement stipulated that the first appellant was required to successfully complete the court or, in the alternative, failed to apply the *contra proferentem* rule; (ii) failed to find that the scholarship agreement was frustrated; (iii) failed to make a finding on acquiescence in favour of the first appellant as the respondent failed to notify her that she breached the agreement when she re-joined service in 2005; (iv) erred in holding that the claim was not barred under limitation law; and (v) erred in holding that the respondent proved the loss in question.

Held (allowing appeal with costs):

(1) There was no merit in the first ground of appeal. Clause (1) of the scholarship agreement required the first appellant to not only undertake the course but to successfully complete it within the prescribed time. Furthermore, cl. 1(h) clearly stipulated that the first appellant had not only undertaken to undergo the doctoral course but that she was obliged to achieve success in her studies. Other clauses in the scholarship agreement provided for the first appellant to apply for extension of time to complete the course. If the argument for the appellants, that the first appellant was not obliged to successfully complete the course by earning the doctoral degree but was merely required to attend a three-year doctoral course was correct, the clause in the scholarship agreement, which stipulated that she was obliged to succeed in her studies and the clause for extension of time would be redundant. Since the clauses were clear, categorical and unambiguous, there was no reason to invoke the *contra proferentem* rule of construction against the respondent. (paras 13-16)

(2) The SCJ referred to the letters that passed between the Registrar of the university, the second supervisor and the first appellant and found that the allegation had no basis in fact. The SCJ found that (i) the claim of the first appellant that the second supervisor refused to comment on the draft thesis or supervise her work was untrue; (ii) the second supervisor had, in fact, commented on the appellant's draft thesis; and (iii) progress report showed that the second supervisor had supervised the first appellant's work. The SCJ rejected the evidence of the first appellant in view of the letters from the second supervisor. As it was not demonstrated that the SCJ erred in principle in rejecting the evidence of the first appellant, her finding of facts did not warrant interference by the appellate court. The second ground of appeal had no merit. (paras 17 & 19)

(3) The first appellant was asked to re-join the service of the respondent in December 2005. The SCJ accepted the respondent's argument that the limitation period had not expired. However, the SCJ failed to discuss when the limitation period started to run in the context of item 95 of the Sabah Limitation Ordinance (Cap. 72) ('SLO'). Instead, the SCJ was of

the opinion that the limitation period ran from the date of the issuance of the first notice of demand dated 21 November 2012. The SCJ seriously misdirected herself in law in respect of the commencement of the limitation period. Item 94, read together with item 95 of the SLO, stipulates that the limitation period is six years for breach of a written contract. In the instant case, the basis of the cause of action was that the first appellant had breached the contract by not being conferred the doctoral degree within the stipulated period of three years or the extended period. This stipulated period expired in 2005 and the first appellant was asked to re-join the service of the respondent without any conditions. Therefore, it was patently clear that the breach of the scholarship agreement occurred in 2005. The instant claim was barred by the SLO. (paras 25, 30 & 40)

(4) The first appellant had, on October 2014, wrote to the respondent, acknowledging her liability. The SCJ accepted the respondent's argument that s. 19(1) of the SLO operated to create a fresh limitation period and limitation period ran afresh from 1 October 2014. The SCJ erred in holding s. 19(1) applied by virtue of the letter. Section 19(1) enacts, in clear words, that acknowledgment of liability must be made before the expiry of the limitation period. The limitation period commenced in 2005 and had long expired before the letter was written in 2014. The letter could not revive a limitation period that had already expired. (paras 43 & 44)

(5) The respondent invited the first appellant to re-join its service as a lecturer for 11 years before terminating the scholarship agreement and demanding all the monies expended on her. In those 11 years, the first appellant would not have saved money to pay the respondent or made arrangement to seek employment elsewhere to augment her income in anticipation of being sued so many years later. The respondent did not give any indication of terminating the agreement and demanding the sum of over RM300,000 during those years. By allowing the first appellant to work for more than 11 years without intimating that she would be sued for breach of contract, the respondent had caused her to alter her position. Thus, it would be plainly inequitable for the respondent to insist upon full payment of all the monies expended on her. She would have to drastically re-arrange her financial affairs to come up with the big sum of money demanded by the respondent who had, for no good reason, slept on its right for 11 years. (para 46)

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Mygal Gibie & Anor [2004] 2 CLJ 525 HC ***(refd)***

Insun Development Sdn Bhd v. Azali Bakar [1996] 2 CLJ 753 SC ***(dist)***

Loh Wai Lian v. Sea Housing Corporation Sdn Bhd [1987] 1 LNS 37 PC ***(dist)***

The Pacific Bank Bhd v. Kerajaan Negeri Sarawak [2015] 3 CLJ 717 FC ***(dist)***

Trengganu State Economic Development Corporation v. Nadefinco Ltd [1982] 1 LNS 46 ***(refd)***

Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd [1978] 1 LNS 244 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 29, 57(2)

Limitation Ordinance (Sabah) (Cap 72), s. 19(1), Schedule items 94, 95

For the appellants - Gaanesh; M/s Gaanseh & Co

For the respondent - Dixon Loi; M/s Jayasuriya Kah & Co

Reported by Najib Tamby

JUDGMENT

Ravinthran Paramaguru J:

Introduction

[1] This is an appeal from the decision of the Sessions Court after a full trial. The appellants were sued by the respondent in relation to a scholarship and study leave given to the first appellant. The other appellants were the guarantors. The Sessions Court entered judgment for the respondent in the sum of RM342,945.93 as prayed and hence the instant appeal by all the appellants.

Brief Facts

[2] The respondent, University Malaysia Sabah or UMS is a university established under the Universities and University Colleges Act 1971. The first appellant is a lecturer in the Business and Accounting Faculty of the respondent. She was granted paid study leave of three years from 21 November 2001 to 20 November 2004 to pursue a Doctor of Philosophy degree (PhD degree) in Commercial Law at the University of Strathclyde, United Kingdom. At the same time, she was also granted a scholarship under the "Skim Latihan Akademik Bumiputera (SLAB)". The agreement that the parties signed in this case is called the "Perjanjian Hadiah Biasiswa Latihan Kakitangan Universiti Malaysia Sabah". In this judgment, I shall refer to it as the "scholarship agreement". The case of the respondent is that the first appellant breached the scholarship agreement by failing to complete her doctoral degree course within the stipulated period of three years or the extended period of three years and six months. The scholarship agreement also provided for an extension of six months which was availed by the first appellant in this case.

[3] The respondent is now claiming the sum of RM342,945.93 which consists of "study leave allowances, expenses and costs incurred which were paid to the first appellant or on her behalf". The respondent is not claiming the salary paid to the first appellant during her study leave.

[4] The first appellant did not dispute that she failed to obtain the PhD degree. She gave some reasons at the trial why she was unable to complete her studies. Her PhD supervisor was one Professor Lloyd. He was frequently on sick leave and went on sabbatical leave when she was in her final year. The replacement supervisor, one Miss Colston was reluctant to comment on the first appellant's thesis. The first appellant reverted to Professor Lloyd but he declined to review her draft thesis. The first appellant was then asked to resume her service with the respondent as her study leave had ended. The first appellant duly rejoined the service of the respondent in 2005 but the instant suit was only filed on 28 September 2016.

[5] The first appellant also argued during the trial that she was not obliged to successfully complete the course and therefore her failure to obtain the PhD degree is not a valid ground for termination of the scholarship agreement.

[6] Thus, to sum up, the defence of the first appellant is that the scholarship agreement was frustrated, that it was terminated without a valid ground and that in any event it is barred by limitation law and the doctrines of acquiescence as well as laches.

Decision Of Sessions Court

[7] On the issue of frustration, the learned Sessions Court Judge found as follows. She considered the evidence of the plaintiff who exhibited letters and reports prepared by Miss Colston who is the second supervisor of the first appellant. She found that the first appellant had managed to consult Miss Colston frequently from 28 May 2004 onwards. She also found that Miss Colston had made comments on the first appellant's progress in her thesis. Miss Colston had even written a letter to the Registrar of the University to comment on the expected date of completion of the first appellant's studies. Thus, she rejected the defence that Miss Colston who was the second supervisor did not comment on her draft thesis and therefore the scholarship agreement was frustrated.

[8] She also rejected the defence that the first appellant was not obliged to successfully complete her doctoral studies by obtaining the PhD degree. She referred to the scholarship agreement and found that the first appellant was to complete (sempurna) the course successfully (capai kejayaan) within three years.

[9] On the issue of limitation, the learned Sessions Court Judge noted that the scholarship agreement was terminated by a "notice of demand and termination" dated 8 June 2016. Since the first appellant did not pay the sum demanded within 60 days from the date of the said notice, she found that the cause of action accrued on 7 August 2016.

[10] In respect of the issue of acquiescence and laches, the learned Sessions Court Judge did not discuss it in her written judgment and thus made no finding on it although it was addressed in the submissions.

Grounds Of Appeal

[11] The grounds of appeal in summary are as follows:

(i) The Sessions Court Judge erred in holding that the scholarship agreement stipulated that the first appellant is required to successfully complete the course. In the alternative, the Sessions Court failed to apply the *contra proferentem* rule.

(ii) The Sessions Court Judge failed to find that the scholarship agreement is frustrated.

(iii) The Sessions Court Judge failed to make a finding on acquiescence in favour of the first appellant as the respondent failed to notify her that she breached the agreement when she rejoined service in 2005.

(iv) The Sessions Court Judge erred in holding that the claim was not barred by limitation law.

(v) The Sessions Court Judge erred in holding that the respondent had proved the loss in question.

Whether First Appellant Obliged To Obtain PhD Degree?

[12] Counsel for the appellants submitted that the scholarship agreement did not stipulate that the first appellant ought to be conferred the PhD degree at the end of the three-year study leave by the University of Strathclyde. Therefore, he argued that the first appellant did not breach the scholarship agreement although she failed to obtain the PhD degree.

[13] I agree with the learned Sessions Court Judge that there is no merit in this ground of appeal. The scholarship agreement is written in the Malay language. Clause 1(a) says as follows:

> PELAJAR dengan ini berjanji, bersetuju dan mengakui bahawa dalam masa tempoh kursus/pengajian PELAJAR akan:
>
> (a) Memasuki, mengikuti dengan bersungguh-sungguh, meneruskan dan menyempurnakan kursus latihan/pengajian yang dikehendaki ... dalam tempoh masa yang ditetapkan ....

[14] The above-mentioned provision required the first appellant not only to "undertake the course" but to successfully complete it (menyempurnakan kursus) within the prescribed time. Furthermore, cl. 1(h) states as follows in part:

> ... PELAJAR ... hendaklah menunjuk dan mencapai kejayaan yang memuaskan di dalam pengajiannya.

[15] The above provision clearly stipulates that the first appellant has not only undertaken to merely undergo the doctoral course but that she is obliged to achieve success in her studies. Other clauses in the scholarship agreement provide for the first appellant to apply for extension of time to complete the course. As stated in the Federal Court case of *Trengganu State Economic*

Development Corporation v. Nadefinco Ltd [1982] 1 LNS 46; [1982] 1 MLJ 365 which was cited by counsel for the respondent, in interpreting an expression in a contract, it must considered in light of other words appearing in the context in which it is used and all other clauses relating thereto.

[16] If the argument of counsel for the appellants that the first appellant was not obliged to successfully complete the course by earning the PhD degree but was merely required to attend a three-year doctoral course is correct, the clause in the scholarship agreement which stipulated that she is obliged to succeed in her studies and the clause for extension of time would be redundant. For the above reasons, my reading of the above-mentioned clauses is that the first appellant was obliged to complete the doctoral course successfully by being conferred the PhD degree within the prescribed time. Since the said clauses are clear, categorical and unambiguous, I see no reason to invoke the *contra proferentem* rule of construction against the respondent.

Frustration

[17] The second ground is that the scholarship agreement was frustrated because the second supervisor did not want to make comments on the draft thesis of the first appellant. I see no merit in this ground of appeal for the following reasons.

[18] The common law doctrine of frustration is re-enacted in s. 57(2) of the Contracts Act 1950. It reads as follows:

> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

[19] The learned Sessions Court Judge referred to the letters that passed between the Registrar of the University, the second supervisor and the first appellant and found that the allegation had no basis in fact. She found that the claim of the first appellant that Miss Colston refused to comment on the draft thesis or supervise her work was untrue. She found that Miss Colston had in fact commented on the draft thesis of the first appellant as stated in the letter dated 16 September 2004. She also considered the progress report attached to the said letter. It shows that Miss Colston had supervised the work of the first appellant. The learned Sessions Court Judge also considered the evidence of the first appellant that Miss Colston was reluctant to supervise her work and she had to refer to her first supervisor who again refused to comment on her draft thesis. It is apparent that she rejected the evidence of the first appellant in view of the letters from Miss Colston that was tendered into evidence. In my view, as it is not demonstrated that the trial judge erred in principle in rejecting the evidence of the first appellant, her finding of fact does not warrant interference by the appellate court.

Limitation

[20] The first appellant was asked to rejoin the service of the respondent on 12 December 2005 and continue in her post as a lecturer. By that time, she had completed her three-year doctoral studies although she failed to obtain the PhD degree. However, the respondent did not terminate the scholarship agreement when the first appellant was recalled to work. Neither did the respondent ask her to pay back the monies allegedly expended on her for the doctoral course in the United Kingdom under the terms of the scholarship agreement in question.

[21] The respondent sued the appellants only in September 2016. Prior to the issuance of the writ, the respondent issued a notice of demand and termination dated 8 June 2016. Thus, the notice of demand and termination letter were issued more than 11 years after the first appellant failed to obtain the PhD degree.

[22] The appellants pleaded that the claim was barred by the Sabah Limitation Ordinance (Cap 72). Counsel for the appellants submitted that under item 95 of Schedule to the Ordinance, a suit for compensation for breach of contract in writing has to be instituted within six years from the time the contract is broken. Item 95 provides that "the period of limitation would begin to run against a suit brought on a similar contract not in writing." Thus, item 95 must be read with item 94 which concerns a contract not in writing.

[23] Items 94 and 95 read as follows:

	Description of Suit		Time from which period begins to run
94.	For compensation for the breach of any contract, express or implied, not in writing and not herein specially provided for.	Three Years.	When the contract is broken or, where there are successive breaches, when the breach in respect of which where the breach is continuing, when it ceases.
95.	For compensation for the breach of a contract in writing.	Six Years.	When the period of limitation would begin to run against a suit brought on a similar contract not in writing.

[24] In the instant case, there is no question of successive breaches. In any event, counsel for the respondent did not argue to that effect. Thus, the only crucial issue in respect of limitation law is the commencement of the limitation period. On this issue, the parties differ.

When Limitation Period Starts To Run?

[25] The learned Sessions Court Judge accepted the argument of counsel for the respondent that the limitation period had not expired in the instant case. However, she did not discuss when the limitation period started to run in the

context of item 95 of the Sabah Limitation Ordinance (Cap. 72). Instead, she agreed with counsel for the respondent that the limitation period ran from the date of issuance of the first notice of demand which is dated 21 November 2012. This notice of demand was issued by the respondent and not their solicitors. However, the respondent did not issue a letter of termination. The Sessions Court Judge said that limitation period would only expire on 21 February 2019 with regard to this notice of demand. The solicitors of the respondent issued a second notice of demand dated 8 August 2016. This notice of demand is curiously termed as notice of demand and termination. In the said letter, a demand for payment is made and then it purports to terminate (penamatan) the scholarship agreement. The learned Sessions Court Judge ruled that the limitation period would only expire on 7 August 2022 with regard to this notice of demand and termination.

[26] The argument of counsel for the respondent was as follows. He submitted that the cause of action "accrued" only on 8 August 2016 which is the date of the notice of demand that also purportedly terminated the scholarship agreement. The first appellant had 60 days to pay up the sum expended on her and therefore the respondent had six years and 60 days from the date of the notice of demand to institute the suit in question.

[27] Counsel for the respondent conceded in his written submission that for a claim arising from breach of a written contract, the limitation period would run upon breach of the contract under item 95 of the Sabah Limitation Ordinance (Cap. 72). However, he submitted that contracting parties can postpone the date of accrual of the cause of action. He cited three cases in support, ie, *Insun Development Sdn Bhd v. Azali Bakar* [1996] 2 CLJ 753; [1996] 2 MLJ 188, *The Pacific Bank Bhd v. Kerajaan Negeri Sarawak* [2015] 3 CLJ 717; [2014] 6 MLJ 153 and *Loh Wai Lian v. Sea Housing Corporation Sdn Bhd* [1987] 1 LNS 37; [1987] 2 MLJ 1.

[28] Counsel for the respondent argued that the first appellant and the respondent had postponed the date of accrual of the cause of action because of cl. 8(iv) of the scholarship agreement which reads as follows:

> Adalah diisytiharkan dan dipersetujui lagi bahawa jikalau Perjanjian ini ditamatkan oleh pihak UNIVERSITI mengikut Fasal 5 atau 6 atau jika PELAJAR:
>
> (iv) meletak jawatan untuk apa sebab sekalipun ingkar, atau oleh sebab keburukan kelakuannya menjadikan dirinya tidak sesuai untuk berkhidmat atau terus berkhidmat dengan UNIVERSITI maka dalam mana-mana hal yang demikian ini UNIVERSITI boleh menurut budibicara mutlaknya **menamatkan Perjanjian ini dan dengan itu PELAJAR dan PENJAMIN-PENJAMIN hendaklah bersama-sama dan masing-masing bertanggungjawab** bagi pihak mereka, waris-waris, wasi-wasi, penerima-penerima serahak mereka, membayar kepada UNIVERSITI apabila diminta dalam tempoh enam puluh (60) hari wang sebanyak Ringgit Malaysia SATU RATUS DUA PULUH RIBU SAHAJA (RM120,000.00) atau semua wang yang telah dibayar kepada PELAJAR atau bagi pihaknya

A secara gaji, elaun-elaun atau sebaliknya dan semua wang yang telah dibelanjakan atau tanggungannya telah diterima oleh UNIVERSITI secara yuran, tambang, dan lain-lain bersangkutan dengan atau disebabkan oleh Perjanjian ini mengikut yang mana lebih banyak.

(emphasis added)

B **[29]** Counsel for the respondent submitted that in accordance with cl. 8, the respondent terminated the scholarship agreement on 8 June 2016. The letter of demand and termination refers to cls. 8 and 9 of the scholarship agreement. Therefore, he submitted that respondent is only entitled to sue if payment is not made within 60 of the said date. Therefore, the limitation C period would only expire on 7 August 2022. Alternatively, if the first notice of demand dated 23 November 2012 is considered, he submitted that the claim would be barred by limitation law only on 22 January 2019.

[30] In my opinion, the learned Sessions Court Judge had seriously misdirected herself in law in respect of the commencement of the limitation D period by accepting the above argument of counsel for the respondent. Item 94 read together with item 95 stipulates that the limitation period is six years for breach of a written contract. Parties are on common ground that the item 95 applies to this case. However, item 95 clearly provides that limitation period runs from the time of the breach of the contract. In the E instant case, the basis of the cause of action is that the first appellant had breached the contract by not being conferred the PhD degree within the stipulated period of three years or the extended period of three years and six months. This stipulated period expired in 2005 and the first appellant was asked to rejoin the service of the respondent without any conditions. F Therefore, it is patently clear that the breach of the scholarship agreement occurred in 2005 when the first appellant returned to the service of the first respondent after spending three years and six months in the United Kingdom without being conferred the PhD degree.

[31] For the above reasons, the learned Sessions Court Judge was wrong to G look at the date of the issuance of the notice of demand and termination in 2016 to determine the time of the commencement of the limitation period. The limitation period under items 94 and 95 runs from the time "when the contract is broken" as stated in the third column of the Schedule to the Sabah Limitation Ordinance (Cap. 72). Obviously, in the instant case, the contract H was broken when the first appellant returned without being conferred the PhD degree after the extended study leave of three years and six months. Thus, as correctly pointed out by counsel for the appellants, the six-year limitation period started to run in 2005.

[32] Counsel for the respondent agreed that ordinarily, the limitation I period runs from the time the contract is broken. But he too argued that commencement of the limitation period has been postponed by mutual agreement because of cl. 8(iv) that I reproduced above. To my mind, reliance

on cl. 8(iv) is unhelpful as there is nothing in the provision that faintly suggests that the contracting parties had agreed to postpone the limitation period.

[33] Instead, the said clause stipulates that the respondent can terminate the contract if the first appellant resigns from service, or is insubordinate or is of bad character or is deemed unsuited to continue in service. Therefore, nothing in this clause entitles the respondent to terminate the scholarship on account of the failure on the part of the first appellant to complete the doctoral course successfully. And most importantly, for the purpose of the discussion at hand, there is nothing in this clause that postpones the commencement of the limitation period.

[34] In the premises, the argument that the limitation period had been postponed by cl. 8(iv) of the scholarship agreement is flawed. Nothing in the other sub-clauses of cl. 8 state that the contracting parties had by mutual agreement postponed the commencement of the limitation period under the third column of the Schedule to the Sabah Limitation Ordinance (Cap. 72). There is nothing in cl. 9 either that postpones the commencement of the limitation period.

[35] Counsel for the respondent forcefully argued that the respondent can only sue after the issuance of the notice of termination and the notice of demand. It may well be so. That would mean that the respondent cannot sue without issuing a notice of termination as in the case of a demand guarantee. But as I said earlier nothing in any of the clauses of the entire scholarship agreement can be read as postponing the commencement of the limitation period. If the respondent had issued the notice of termination within the limitation period of six years that started to run in 2005, they would have been able to institute legal action without running afoul of limitation law. However, they waited for 11 years without taking any action.

[36] The three cases in question cited by counsel for the respondent can be easily distinguished. In those cases, there were clear provisions in the agreement that postponed the commencement of the limitation period.

[37] In *Loh Wai Lian v. Sea Housing Corporation Sdn Bhd (supra)*, which concerned a construction contract, the vendor failed to complete the building within 18 months which is on 18 September 1975. It was completed only on 7 November 1977. The purchaser sued the vendor only in September 1982. The decisions of the High Court and the Federal Court that the claim for liquidated ascertained damages (LAD) was barred by limitation law was overturned by the Privy Council. The reason was that cl. 17 provided that the sum claimed by the purchaser did not become due until it is ascertained. His Lordships also said as follows:

> ... parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided.

[38] In *Insun Development Sdn Bhd v. Azali Bakar (supra)*, the facts were more or less similar. The developer was obliged under cl. 18 to deliver the completed house within 24 months from the date of the sale and purchase agreement. The purchaser commenced an action for LAD more than six years after the date stipulated in cl. 18. The Federal Court held that "it is clear law that in the absence of express contractual provision, the purchaser's right to sue for damages would accrue on the date of the breach of contract but the parties to a contract are free to regulate or modify their rights in the event of breach thereof in such a manner as to postpone the date of accrual of their right to sue for damages". However, in that case, the Federal Court ruled that the general principle applied as cl. 18 provided the opening date but not the closing date for the calculation of LAD. The Federal Court distinguished *Loh Wai Lian v. Sea Housing Corporation Sdn Bhd (supra)* and held that the claim was barred by limitation law.

[39] In *The Pacific Bank Bhd (sued as guarantor) v. Kerajaan Negeri Sarawak (supra)*, the cause of action was based on a guarantee agreement. The guarantee in question required all claims to be made during the one year guarantee period. The main issue in that case was whether s. 29 of the Contracts Act 1950 applied. However, in relation to postponement of a cause of action by agreement, the Federal Court said that "should a guarantee prescribe that a certain event must happen before a cause of action accrues, for example, the making of a prior demand, then that has to be complied with before a cause of action can arise and a right to sue accrues".

[40] However, it must be noted that none of the above-mentioned cases are on point in relation to the scholarship agreement in question. There is no clause in the scholarship that postpones the limitation period prescribed in item 95 of the Sabah Limitation Ordinance (Cap. 72). For all the above reasons, I am of the view that the instant claim is barred by the Sabah Limitation Ordinance (Cap. 72).

Whether There Was Fresh Renewal Of The Limitation Period?

[41] Section 19 (shorn of the explanations) of the Sabah Limitation Ordinance (Cap. 72) reads as follows:

> 19. (1) If before the expiration of the period prescribed for a suit in respect of any property or right an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgement was so signed.
>
> (2) When the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received.

[42] This provision enacts that if there is a written acknowledgment of the liability in question before the expiry of the specified limitation period, a fresh limitation shall run from the time of the said acknowledgement.

[43] In the instant case, the learned Sessions Court Judge accepted the argument of the respondent that s. 19(1) of the Sabah Limitation Ordinance (Cap. 72) operated to create a fresh limitation period. The reason is this. On 1 October 2014, first appellant wrote to the respondent. In the said letter, she acknowledged liability and pleaded that no action be taken against her as she is now pursuing a PhD degree at a local university. The learned Sessions Court Judge held that the limitation period ran afresh from 1 October 2014.

[44] In my opinion, the learned Sessions Court Judge erred in holding that s. 19(1) applied by virtue of the said letter. Section 19(1) enacts in clear words that acknowledgement of liability must be made before the expiry of the limitation period. In the instant case, the limitation period commenced in 2005 and had long expired before the said letter was written in 2014. In the premises, the said letter cannot revive a limitation period that had already expired (see *Borneo Housing Mortgage Finance Berhad v. Mygal Gibie & Another* [2004] 2 CLJ 525).

Laches And Acquiescence

[45] Counsel for the appellants had submitted that the claim is barred by equitable doctrines of laches and acquiescence. In *Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd* [1978] 1 LNS 244; [1979] 1 MLJ 182, Hashim Yeop Sani at the High Court explained the equitable doctrine of laches as follows:

> To set out the general principles first, it is an established rule of equity that a plaintiff in equity is bound to prosecute his claim without undue delay. A court of equity would refuse its aid to stale demands, ie, where the plaintiff has slept upon his right and acquiesced for a great length of time. For "laches" literally means negligent inactivity. He is then said to be barred by his laches. (*Halsbury's* 3rd edn vol 14, p 641). In determining whether there has been such delay as to amount to laches the main points to be considered are acquiescence on the part of the plaintiff and secondly whether any change of position has occurred on the defendant's part.

[46] In the instant case, the respondent invited the first appellant to rejoin its service as a lecturer for 11 years before terminating the scholarship agreement and demanding all the monies expended on her. It can be fairly said that in those 11 years, the first appellant would not have saved money to pay the respondent or made arrangements to seek employment elsewhere to augment her income in anticipation of being sued so many years later. And the reason is simple. The respondent did not give any indication of terminating the agreement and demanding the sum of over RM300,000

during those years. I am of the view that by allowing the first appellant to work for more than 11 years without intimating that she would be sued for breach of contract, the respondent had caused her to alter her position. Thus, it would be plainly inequitable for the respondent to insist upon full payment of all the monies expended on her. She would have to drastically re-arrange her financial affairs to come up with the big sum of money demanded by respondent who had for no good reason slept on its rights for 11 years. In the premises, on the above ground as well, the appeal should be allowed.

Conclusion

[47] For all the above reasons, I shall allow the appeal with costs of RM3,500 here and below subject to allocatur fee.